Pembinaan Purcon v Entertainment Village (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP PETITION NO D4–28–498 OF 2003
ABDUL MALIK ISHAK J
5 JANUARY 2004

Companies and Corporations — Winding up — Petition — Petition under s 218 of Companies Act 1965 — Counterclaim or set off — Whether right to set off or counterclaim arose — Principles of set off and counterclaim

Companies and Corporations — Winding up — Petition under s 218 of the Companies Act 1965 — Whether the claim was premature — Whether existed a bona fide dispute of debt to allow a winding up petition taken against respondent — Companies Act 1965 s 218

The petitioner was appointed as a sub–contractor by the respondent, MSC E–Resource Development Sdn Bhd ('MSCERD') to carry out the development of certain parts of a project known as the entertainment village located at Sepang ('E–Village'). MSCERD is a joint venture company formed between Meitech Development Sdn Bhd ('Meitech' — a wholly owned subsidiary of Multimedia Development Corporation Sdn Bhd ('MDC')) and Kumpulan Darul Ehsan Berhad. There were two time frames agreed upon by the parties for the completion of the development works, to wit, 15 August 2000 and 31 August 2000 ('completion dates'). Pursuant to cl 6 of the letters of awards, a penalty will be imposed by the respondent against the petitioner in the event the petitioner fails to complete the works by the completion dates which can be deducted by the respondent from any monies due to the petitioner. The architect for the respondent had called on all the sub–contractors to meet somewhere in September 2000 in order to chart the progress and pre–requisites in the issuance of the certificate of practical completion ('CPC'). On 13 November 2000, the consultant engineers, Messrs Angkasa Jurutera Perunding Sdn Bhd issued a letter to the respondent informing the latter of the defects to be rectified by the petitioner and on 8 January 2001, issued a letter to the respondent relaying the message that the operation and maintenance manuals including the 'as–built' drawings have not been submitted. The petitioner had refused to hand over those documents until some payment had been made. The petitioner stated that it had forwarded those documents to MDC. But the stand of the respondent was that there was no acknowledgment from the recipient of the documents that the documents had indeed been forwarded and that, if forwarded, MDC was not the architect nor the consultant engineer. In the early part of 2001, the parties were negotiating a compromise on condition that the petitioner would submit those documents to the respondent within one and a half months of receipt of payment. Later, it transpired that on or about the month of April 2001, the plaintiff through direct negotiations with MDC accepted MDC's offer to assume liability for the outstanding amount. Payments were made. But, despite these payments, the petitioner did not forward the documents to the respondent. The petitioner disputed that the respondent was entitled

to deduct any liquidated damages pursuant to clause 6 of the letters of awards. The petitioner then presented a winding up petition against the respondent under s 218 of the Companies Act 1965 ('the Act') in respect of a sum of RM5,721,387.97 that was said to be outstanding and due to the petitioner. But no judgment had been obtained in respect of the amount stated to be owing in the petition.

Held, striking out the petition:

(1) The petitioner through direct negotiation with MDC had accepted MDC's offer to assume liability for the outstanding amount and so the respondent was relieved of the obligation to pay. The agreement was not merely a guarantee but also an undertaking to pay by MDC. And pursuant to that undertaking to pay, MDC had made several payments. Since the petitioner had accepted MDC's offer and undertaking to pay, it could not attempt to enforce payment against the respondent by way of a winding up proceeding (see para 20); s 42 of the Contracts Act 1950; *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108; *Kerpa Singh v Bariam Singh* [1966] 1 MLJ 38; *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82; *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor* [1985] 1 MLJ 73 followed.

(2) Since there was a bona fide dispute over the debt, the petitioner was not a creditor as envisaged under the Act The presumption of inability to pay the debt was a rebuttable presumption and towards this end, the respondent had succeeded in rebutting the presumption. The respondent had a counterclaim or set off which equalled or exceeded the amount stated to be owing in the petition and that very amount was disputed on substantial grounds (see para 22); *Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad* [2001] 2 AMR 1639; *Kemayan Construction Sdn Bhd v Prestara Sdn Bhd* [1997] 5 MLJ 608 and *Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd* [1990] 1 MLJ 372 followed.

(3) The handing over of the operation and maintenance manuals and the 'as–built' drawings to MDC did not satisfy the condition precedent because those documents must be submitted to either the respondent or the consultant engineers and not to MDC. At any rate, the defects that were brought to the attention of the petitioner had yet to be attended to by the petitioner (see para 28).

(4) There was therefore a bona fide dispute as to the debt. In such a situation, the respondent could not be said to have neglected to pay on a statutory demand. There was also a related general principle of law. A petition for winding up with a view to enforcing payment of a disputed debt was in fact an abuse of the process of the court and should be dismissed forthwith with costs. Every case would depend on its own peculiar facts. The dispute must be bona fide in both its subjective and objective senses. So, the reason for not paying the debt must be honestly believed to be in existence and must be based on

substantial or reasonable grounds. Here, there was a set off or counterclaim ba1sed on substantial grounds (see paras 30–31).

[Bahasa Malaysia summary

Pempetisyen telah dilantik sebagai sub–kontraktor oleh responden, MSC E–Resource Development Sdn Bhd ('MSCERD') untuk menjalankan pembangunan bahagian–bahagian tertentu satu projek dikenali sebagai taman hiburan yang terletak di Sepang ('E–Village'). MSCERD merupakan syarikat usahasama yang ditubuhkan antara Meitech Development Sdn Bhd ('Meitech' — anak syarikat milik penuh Multimedia Development Corporation Sdn Bhd ('MDC')) dan Kumpulan Darul Ehsan Berhad. Terdapat dua jangkamasa yang dipersetujui oleh pihak-pihak untuk menyiapkan kerja-kerja pembangunan tersebut, iaitu, 15 Ogos 2000 dan 31 Ogos 2000 ('tarikh-tarikh siap'). Menurut kl 6 kepada surat-surat award, satu penalti akan dikenakan oleh responden terhadap pempetisyen sekiranya pempetisyen gagal menyiapkan kerja-kerja menjelang tarikh penyipakan yang boleh dipotong oleh responden daripada wang yang perlu dibayar kepada pempetisyen. Arkitek bagi pihak responden telah memanggil semua sub-kontraktor untuk satu pertemuan dalam bulan September 2000 bagi tujuan menyenaraikan perkembangan dan prasyarat-prasyarat dalam sijil amalan penyiapan ('CPC'). Pada 13 November 2000, jurutera pakar runding, Tetuan Angkasa Jurutera Perunding Sdn Bhd telah mengeluarkan sepucuk surat kepada responden memaklumkannya tentang kecacatan yang perlu diperbaiki oleh pempetisyen dan pada 8 Januari 2001, telah mengeluarkan sepucuk surat kepada responden menyampaikan berita bahawa operasi dan manual penyenggaraan termasuklah lakaran-lakaran 'as–built' tidak dikemukakan lagi. Pempetisyen enggan menyerahkan dokumen-dokumen tersebut sehingga sebahagian bayaran telah dibuat. Pempetisyen menyatakan bahawa ia telah mengemukakan dokumen-dokumen tersebut kepada MDC. Tetapi pendirian responden adalah tidak terdapat pengesahan penerimaan dokumen-dokumen tersebut yang ia sememangnya telah dikemukakan dan bahawa, jika telah dikemukakan, MDC bukan arkitek maupun jurutera pakar runding. Pada awal tahun 2001, pihak-pihak telah berunding untuk mendapat kata sepakat dengan syarat pempetisyen mengemukakan dokeumen-dokumen tersebut kepada responden dalam tempoh satu setenagh bulan daripada tempoh penerimaan bayaran. Berikutan itu, pada atau sekitar bulan April 2001, plaintif melalui rundingan secara langsung dengan MDC telah menerima tawaran MDC untuk menanggung liabiliti untuk jumlah baki tersebut. Bayaran telah dibuat. Tetapi, walaupun dengan bayaran tersebut, pempetisyen tidak mengemukakan dokumen-dokumen tersebut kepada responden. Pempetisyen mempertikaikan bahawa responden berhak untuk memotong apa-apa ganti rugi boleh dikira menurut kl 6 kepada surat-surat award tersebut. Pempetisyen kemudiannya telah memulakan satu petisyen penggulungan terhadap responden di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') berkaitan jumlah RM5,721,387.97 yang dikatakan tertunggak dan perlu dibayar kepada pempetisyen. Namun begitu, tiada

penghakiman diperolehi berkaitan jumlah yang dinyatakan terhutang dalam petisyen tersebut. A

Diputuskan, membatalkan petisyen tersebut:

(1) Pempetisyen melalui rundingan secara langsung dengan MDC telah menerima tawaran MDC untuk menanggung liabiliti untuk baki jumlah dan oleh itu responden terlepas daripada tanggungjawab untuk membayar. Perjanjian tersebut bukan hanya satu jaminan tetapi juga satu akujanji untuk membayar oleh MDC. Dan menurut akujanji untuk membayar tersebut, MDC telah membuat beberapa bayaran. Memandangkan pempetisyen telah menerima tawaran MDC dan akujanji untuk membayar, ia tidak boleh cuba untuk menguatkuasakan bayaran terhadap responden melalui satu prosiding penggulungan (lihat perenggan 20); s 42 Akta Syarikat 1950; *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108; *Kerpa Singh v Bariam Singh* [1966] 1 MLJ 38; *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82 dan *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor* [1985] 1 MLJ 73 diikut. B C D

(2) Memandangkan terdapat pertikaian bona fide tentang hutang tersebut, pempetisyen bukan seorang pemiutang sebagaimana dinyatakan dalam Akta tersebut. Andaian ketidakmampuan untuk membayar hutang adalah satu tanggapan yang boleh disangkal setakat ini, responden telah berjaya mematahkan tanggapan tersebut. Responden mempunyai tuntutan balas atau tolakan yang sama atau melebihi jumlah yang dinyatakan terhutang dalam petisyen tersebut dan jumlah tersebut telah dipertikaiakn atas alasan yang substantif (lihat perenggan 22); *Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad* [2001] 2 AMR 1639; *Kemayan Construction Sdn Bhd v Prestara Sdn Bhd* [1997] 5 MLJ 608 dan *Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd* [1990] 1 MLJ 372 diikut. E F

(3) Penyerahan operasi dan manual penyenggaraan dan lakaran-larakan 'as–built' kepada MDC tidak memenuhi syarat terdahulu kerana dokumen-dokumen tersebut perlu diserahkan kepada sama ada responden atau jurutera pakar runding dan bukan MDC. Bahkan, kecacatan yang dimaklumkan untuk perhatian pempetisyen masih belum diperbaiku oleh pempetisyen (lihat perenggan 28). G

(4) Terdapat pertikaian bona fide berhubung hutang tersebut. Dalam keadaan tersebut, responden tidak boleh dikatkan telah lalai untuk membayar satu tuntutan statutori. Terdapat juga satu prinsip undang-undang am yang berkaitan. Satu petisyen penggulungan bagi tujuan menguatkuasakan bayaran satu hutang yang dipertikaikan pada hakikatnya satu penyalahgunaan proses mahkamah dan patut ditolak dengan kos. Setiap kes bergantung kepada faktanya tersendiri. Pertikaian tersebut perlulah bona fide secara subjectif dan objectif. Oleh itu, alasan untuk tidak membayar hutang perlu dipercayai wujud dan perlu berdasarkan alasan-alasan substantif atau munasabah. Di H I

sini, terdapat tolakan atau tuntutan balas berdasarkan alasan-alasan substantif (see paras 30–31).]

Notes

For cases on winding up of petitions under s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1249.

For cases on winding up of petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

Cases referred to

Adams v Adams [1892] 1 Ch 369 (refd)
Alghussein Establishment v Eton College [1988] 1 WLR 587 (refd)
Amon v Bobbett (1889) 22 QBD 548 (refd)
Bryanston Finance Ltd v de Vries (No 2) [1976] Ch 63 (refd)
Claybridge Shipping Co SA Com, Re LR 107 (1981)
Cadiz Waterworks Co v Barnett (1875) LR Eq 182 (refd)
Cercle Restaurant Castiglione Co v Lavery (1881) 18 ChD 555 (refd)
Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108 (folld)
General Exchange Bank (Ltd), Re The (1866) 14 LT 582 (refd)
Great Britain Mutual Life Assurance Society, Re (1880) 16 Ch D 246 (refd)
Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar [1975] 2 MLJ 82 (folld)
Hanak v Green [1958] 2 All ER 141 (refd)
Holt Southey Ltd v Catnic Components Ltd [1978] 2 All ER 276 (refd)
Imperial Anglo–German Bank, Re The (1872) 25 LT 895 (refd)
Imperial Hydropathic Hotel Co, Re The (1882) 49 LT 147 (refd)
Imperial Silver Quarries (1868) 14 WR 1220 (refd)
Kemayan Construction Sdn Bhd v Prestara Sdn Bhd [1997] 5 MLJ 608 (folld)
Kerpa Singh v Bariam Singh [1966] 1 MLJ 38 (folld)
Kings Cross Industrial Dwellings Co, Re (1870) LR 11 Eq 149 (refd)
London & Paris Banking Corp, Re (1875) LR 19 Eq 444 (refd)
KL Tractors Ltd, Re [1954] VLR 505 (refd)
Mann v Goldstein [1968] 1 WLR 1091 (refd)
Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd [1990] 1 MLJ 372 (folld)
Martin Wallis & Co, Re (1893) 37 SL 822 (refd)
Morgan & Son, Ltd v Martin Johnson, Ltd [1949] 1 KB 107 (refd)
Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd [1983] 2 MLJ 317 (refd)
Rawley v Rawley [1876] 1 QBD 460 (refd)
Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad [2001] 2 AMR 1639 (folld)
Richards v James [1848] 2 Ex 471 (refd)
Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor [1985] 1 MLJ 73 (folld)
Welsh Brick Industries Ltd, Re [1946] 2 All ER 197 (refd)

Legislation referred to

Companies Act 1965 s 218
Contracts Act 1950 s 42
Contracts (Malay States) Ordinance 1950 s 64

Vincent Lim (Vincent Lim & Partners) for the petitioner.
M Puravalen (KC Tang & Avtar) for the respondent.

Abdul Malik Ishak J:

Introduction

[1] The petitioner has presented a winding up petition against the respondent under s 218 of the Companies Act 1965 ('the Act') in respect of a sum of RM5,721,387.97 that was said to be outstanding and due to the petitioner. But no judgment has been obtained in respect of the amount stated to be owing in the petition. I struck out the petition with costs since the debt was disputed on substantial grounds (*Re Martin Wallis & Co* (1893) 37 SL 822). My reasons will now follow.

Factual background

[2] The respondent had entered into a development agreement dated 20 April 2000 with MSC E–Resource Development Sdn Bhd ('MSCERD') wherein the respondent was appointed to carry out the development works in respect of a project known as the entertainment village located at Sepang ('the E–Village'). Basically, MSCERD is a joint venture company formed between Meitech Development Sdn Bhd ('Meitech' – a wholly owned subsidiary of Multimedia Development Corporation Sdn Bhd ('MDC')) and Kumpulan Darul Ehsan Berhad.

[3] The petitioner was appointed as a sub–contractor by the respondent to carry out the development of certain parts of the E–Village. A total of eleven letters of awards were issued and out of which works were carried out in respect of only ten of the letters of awards. The ten letters of awards relate to the following development works:

(a) sound studio;
(b) gateway and plaza;
(c) external works (infrastructure works);
(d) administration block and workshops;
(e) virtual studio;
(f) sub–station for TNB;
(g) sewerage treatment plant;
(h) chiller pump room and public toilet;
(i) bridge construction; and
(j) mini Malaysia island.

[4] In essence, there were two time frames agreed upon by the parties for the completion of the development works, to wit, 15 August 2000 and 31 August 2000 (hereinafter referred to as the "completion dates"). Now, it is stipulated in clause 6 of each of the letters of awards that a penalty will be imposed by the respondent against the petitioner in the event the

petitioner fails to complete the works by the completion dates. The penalty was calculated in this manner:

(i) a sum of RM4,000 per day in the event the petitioner fails to complete the works scheduled for completion by 15 Agust 2000 in respect of the letters of awards at items (a) to (e) as stipulated above; and

(ii) a sum of RM1,600.00 per day in the event the petitioner fails to complete the works scheduled for completion by 31 August 2000 in respect of the letters of awards at items (f) to (j) as stipulated above.

[5] Furthermore, by way of cl 6 of the letters of awards the sums of RM4,000 and RM1,600 shall be deducted by the respondent from any monies due to the petitioner.

Progress claims and final site measurements

[6] It was agreed, inter alia, between the parties as follows:

(a) that by cl 7 of the letters of awards, the progress claims were subject to a final site measurement; and

(b) that by cl 10 of the letters of awards, the progress payment will be issued 14 days from the date of certification subject to a retention of 5% of the total contract sum.

[7] I took into account the submissions that the progress claims paid by MDC or through Meitech were made in good faith.

Defects and the submissions of documents

[8] On or about the month of September 2000, the architect by the name of Messrs PDAA Sdn Bhd called on all the sub–contractors to meet in order to chart the progress and pre–requisites in the issuance of the certificate of practical completion ('CPC'). It must be noted that the petitioner was a party to this meeting.

[9] On 13 November 2000, the consultant engineers by the name of Messrs Angkasa Jurutera Perunding Sdn Bhd issued a letter to the respondent informing the latter of the defects to be rectified by the petitioner. There were also other letters and documents that were issued to the petitioner to rectify the defects and these can be seen in exhs 'AM–3' and 'AM–4' of encl 8.

[10] On or about 8 January 2001, Messrs Angkasa Jurutera Perunding Sdn Bhd issued a letter to the respondent relaying the message that the operation and maintenance manuals including the 'as–built' drawings have not been submitted. Now, these manuals and drawings were documents within the sole control of the petitioner and that the same have not been handed over to the respondent or even to Messrs Angkasa Jurutera Perunding Sdn Bhd. Such failures had prevented the consultant engineers from verifying and certifying the satisfactory completion of the works. The petitioner had refused to hand over those documents until some payment had been made. It must be borne in mind that in the early part of 2001, the

parties were negotiating a compromise on condition that the petitioner would submit those documents to the respondent within one and a half months of receipt of payment. Later, it transpired that on or about the month of April 2001, the plaintiff through direct negotiations with MDC accepted MDC's offer to assume liability for the outstanding amount. Copies of the letters setting out the terms of the agreement between the petitioner and MDC can be seen in exh 'LTH–4' of encl 13. Payments were indeed made. In fact, the petitioner had subsequently received various amounts from MDC or from them through Meitech as reflected in exh 'LTH–15' of encl 13. But, despite these payments, the petitioner did not forward the documents to the respondent. By way of para 20 of encl 13, the petitioner stated that it had forwarded those documents to MDC and attached their letter enclosing the documents as exh 'LTH–7' in encl 13. But the stand of the respondent was this. That there was no acknowledgment from the recipient of the documents that the documents had indeed been forwarded and that, if forwarded, MDC was not the architect nor the consultant engineer.

The undisputed facts

[11] ther than the letters of awards, no other contract documents were signed by the parties. The consultant engineers of the E–Village has not verified nor certified the satisfactory completion of the works. The CPC has not been issued by the architect at all. The respondent has not received the operation and maintenance manuals including the 'as–built' drawings. The payments made by MDC or through Meitech after April 2001 were made pursuant to an agreement reached between the petitioner and MDC. The terms of the agreement can be seen in the exchange of correspondences between the petitioner and MDC in exh 'LTH–4' of encl 13. Even the petitioner had commenced legal proceedings against MDC for the recovery of the amount claimed in the petition.

The disputed facts

[12] The petitioner disputed that the respondent was entitled to deduct any liquidated damages pursuant to cl 6 of the letters of awards and alleged the following set of facts:

(i) that the works were completed by the completion dates;

(ii) that there was no provision in the letters of awards requiring the CPC to be issued to the consultant; and

(iii) that the sum of RM23,387,000 was arrived at after discussions and a discount was given, and that this amount was therefore the final amount wherein a part payment of RM17,665,612.03 had been made.

The pre–matureness of the petitioner's claim

[13] It was part and parcel of my judgment that the petitioner's claim was premature for the following reasons:

(a) the consultant engineer had not verified nor certified the completion of the works and so the petitioner's claim had not been finalized and therefore uncertain; and

(b) the CPC has not been issued by the architect.

The assumption of liability by MDC

[14] The petitioner through direct negotiation with MDC has accepted MDC's offer to assume liability for the outstanding amount and so the respondent was relieved of the obligation to pay. By letter dated 11 April 2001, the petitioner addressed it to MDC wherein it confirmed MDC's undertaking and guarantee to pay the petitioner all the outstanding monies due and owing by the respondent. That very letter can be seen in exh 'LTH–4' of encl 13. It must be emphasized that the agreement was not merely a guarantee but also an undertaking to pay by MDC. And pursuant to that undertaking to pay, MDC had made several payments and such payments were confirmed by the petitioner as seen in para 11 of encl 13.

[15] Section 42 of the Contracts Act 1950 enacts as follows:

> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

[16] In *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108, one of the grounds advanced by the appellant was that under s 42 of the Contracts Act 1950, the respondents were not entitled to enforce their claim against the appellant but to proceed against the third party who had agreed to pay the judgment debt. Delivering the judgment of the then Supreme Court, Ajaib Singh SCJ aptly said at p 110 of the report:

> We are of the view that the learned judge failed to give due regard to s 42 of the Contracts Act 1950. The case of *LYL Hooker Sdn Bhd* [1987] 2 MLJ 52 referred to by the learned judge dealt with the question of novation and assignment. In that case, s 42 of the Contracts Act 1950 was not in issue and hence was not considered by the High Court nor by the Federal Court. In the present appeal before us, counsel for the appellant relied strongly on s 42 of the Contracts Act 1950 and we agree with him that by virtue of the appellant's letter of 27 May 1985, the provisions of s 42 applied and therefore the respondents having accepted the performance of the appellant's obligation to pay his debt to them by a third party, namely, Hock Hin Leong Sdn Bhd, the respondents were precluded from enforcing the judgment debt against the appellant. The question of assignment and novation therefore did not arise in this case. In the circumstances, therefore, we held that the respondents were not entitled to enforce the default judgments against the appellant. The consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular. We accordingly allowed the appeal with costs and set aside the bankruptcy notice and the bankruptcy petition.

[17] Another case that should be referred to would be the case of *Kerpa Singh v Bariam Singh* [1966] 1 MLJ 38, a decision of the then Federal Court. That case concerned an appeal against an order that the bankruptcy notice taken out by the appellant creditor be set aside on the ground that the judgment debt had been satisfied by the tender by a third party of a

cheque for a smaller amount than the sum due as payment in full, which cheque was accepted and cashed by the creditor. It was argued by the appellant that on the facts there was no accord and satisfaction and in any event s 64 of the Contracts (Malay States) Ordinance 1950 had no application where the parties stood to each other in the position of judgment debtor and decree holder. The then Federal Court held that as the creditor had accepted the tender by cashing the cheque and retaining the money he must be taken to have agreed to discharge the debtor from any further liability.

[18] This would be followed by the case of *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82, another decision of the then Federal Court. In that case, the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was $25,000 and that for the respondent's land was $14,000 thereby leaving a balance of $11,000 which was agreed to be settled by: (a) Nik Hassan $4,000; and (b) Nik Abdul Majid Yahya $7,000. Both Nik Hassan and Nik Abdul Majid Yahya were the sons of the respondent. Unfortunately, Nik Abdul Majid Yahya did not settle the sum of $7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed by the High Court and he appealed to the then Federal Court. In dismissing the appeal, the then Federal Court held that as the appellant had agreed to accept performance of the promise from the third person, he could not under s 42 of the Contracts Act 1950 enforce it against the respondent.

[19] Next, it would be the case of *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor* [1985] 1 MLJ 73. In that case, in allowing the appeal, the learned High Court judge held that s 42 of the Contracts Act 1950 applied only when a contract has in fact been performed by a third person and that since the contract was never performed by the second defendant because the cheques that the second defendant gave in payment of the debt were all dishonoured.

[20] It must be borne in mind that the principle of law worth noting in this. That there is a presumption that a party to a contract could not be permitted to take advantage of his own wrong as against the other party (*Alghussein Establishment v Eton College* [1988] 1 WLR 587; and *Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd* [1983] 2 MLJ 317). Now, since the petitioner had accepted MDC's offer and undertaking to pay, it cannot attempt to enforce payment against the respondent by way of a winding up proceeding.

Analysis

[21] The petitioner will have to show and failed to show that:

(a) it was a creditor as envisaged under the Act;

(b) the debt was undisputed; and

(c) the respondent was unable to pay its debts.

[22] Since there was a bona fide dispute over the debt, the petitioner was not a creditor as envisaged under the Act (*Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad* [2001] 2 AMR 1639; *Kemayan Construction Sdn Bhd v Prestara Sdn Bhd* [1997] 5 MLJ 608; and *Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd* [1990] 1 MLJ 372). It has always been the law that the presumption of inability to pay the debt is a rebuttable presumption (*Kemayan Construction Sdn Bhd v Prestara Sdn Bhd*) and towards this end the respondent has succeeded in rebutting the presumption. The respondent has a counterclaim or set off which equals or exceeds the amount stated to be owing in the petition and that very amount is disputed on substantial grounds.

[23] I will now say something about the set off or counterclaim for the liquidated damages.

[24] In essence, a set off is a monetary cross–claim and it is a defence to the claim made in the action. According to Morris LJ in *Hanak v Green* [1958] 2 All ER 141, p 152, 'The question as to what is a set off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings.' It is germane to mention that in regard to a claim arising out of a transaction between the parties there could in effect be a set off arising under the same transaction whether sounding in debt or unliquidated damages (*Morgan & Son, Ltd v Martin Johnson, Ltd* [1949] 1 KB 107). So it can be surmised that the right to set off a sum of money whether the amount is ascertained or otherwise is now expressly recognized. The sum set off must have accrued and become due at the commencement of the action (*Richards v James* [1848] 2 Ex 471) and that all the proper defences may be set up by way of a reply (*Rawley v Rawley* [1876] 1 QBD 460).

[25] A counterclaim may comprise of several distinct causes of action. It is governed by the same rules of pleading as a statement of claim just like the defence to the counterclaim which is also governed by the same rules as a defence. A counterclaim may be drafted for either liquidated or unliquidated damages. It may exceed in quantum the claim of the plaintiff or it may be less than it. A claim by way of set off or counterclaim is deemed to be a separate action and it is to commence on the same date as the action in which it is pleaded. Simply put, a set off is a defence to the plaintiff's claim or to a portion of it. It must be borne in mind that every set–off may be pleaded as a counterclaim if the defendant so desires. But, every counterclaim cannot be pleaded as a set off. It is germane to mention that a counterclaim is in practical terms a cross–claim. According to Bowen LJ in *Amon v Bobbett* (1889) 22 QBD 548, 'A counterclaim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action.' Now, after the defendant has pleaded a counterclaim, the plaintiff's action is for some reason or other stayed, discontinued or dismissed, the counterclaim, notwithstanding all these, may still be proceeded with. A good and classic example would be the case of *Adams v Adams* [1892] 1 Ch

369 where the court held that the plaintiff's claim was frivolous yet the court still granted the defendant the relief prayed for by his counterclaim. A

[26] I will now allude to the facts, once again.

[27] It was not disputed by the petitioner that the consultant engineers for the E–Village has not verified nor certified the satisfactory completion of the works and that the CPC has not been issued by the architect. Now, the petitioner relied on exh 'LTH–2' of encl 13 which was a letter from the respondent stating that the CPC will take effect as of 8 September 2000. But that letter was issued by the respondent who had no authority or capacity to give such verification or certification of the petitioner's final claim. The petitioner cannot deny that the final sum is re–measurable as provided for under cl 7 of the letters of awards and neither can the petitioner deny that under cl 10 of the letters of awards payment would only be effected after certification. B C

[28] Moreover, the petitioner's final claim as seen in exh 'LTH–6' of encl 13 clearly stated that certificates were issued in respect of the previous five claims. It followed that even if the letters of awards did not set out in detail the manner in which the petitioner's claims would be certified, the parties have through practice adopted a mode of certification which was now binding on the parties. Furthermore, it must be borne in mind that the issue of the finalisation of the actual contract sum and the issuance of the CPC were raised as far back as September 2000 (see exhs 'AM–2' of encl 8 and 'AM–5' of encl 8). Premised on the above facts and the fact that the contract sums as set out in the letters of awards were not fixed contract sums but rather re–measurable, the petitioner cannot deny that the final measurement and certification will be required to be carried out. It must be recalled that the respondent had written to the petitioner in regard to the defects and the respondent had requested for the as–built drawings and the maintenance and operations manuals. These documents were crucial and they had to be submitted and handed over in order for the CPC to be issued. These documents, for want of repetition, were never handed over to the respondent but the petitioner alleged that they were handed over to MDC. The issue that needed to be tackled would be this: would the handing over of those documents to MDC satisfy the condition precedent required for the issuance of the CPC? The respondent submitted and I agreed that it did not satisfy the condition precedent because those documents must be submitted to either the respondent or the consultant engineers and not to MDC. At any rate, the defects that were brought to the attention of the petitioner vide exhs 'AM–2', 'AM–3' and 'AM–4' of encl 8 have yet to be attended to by the petitioner. D E F G H

[29] It was submitted on behalf of the respondent that the parties have agreed that a penalty will be imposed by the respondent against the petitioner in the event the petitioner failed to complete the works by the completion dates. It was further submitted that to date the certification of the final claim has yet to be completed and that the CPC has yet to be issued by the architect; and that being the case it was pointed out that the I

respondent was entitled to claim the liquidated damages against the petitioner — which was continuing on a daily basis. But the petitioner took the position that since the sum of RM23,387,000 had been agreed upon and part payments have been made leaving the amount still due and outstanding, the respondent was not entitled to any liquidated damages. The respondent's response to this retort would be this. That although the petitioner and the respondent had initially by an exchange of letters attempted to arrive at a compromise, the respondent had always maintained that as a condition precedent, the as–built drawings and the maintenance and operations manuals have to be forwarded to the respondent. The final compromise and agreement arrived at was between MDC and the petitioner. It was pointed out that the respondent was not aware if there was any waiver in regard to the submissions of those documents or in regard to the re–measurement and certification and issuance of the CPC. If there was, the respondent was not informed of any such waiver — so the learned counsel for the respondent pointed out. Now, the germane issue for consideration would be: when would the actual completion date be or when would completion be deemed to have taken place? The stand of the respondent was quite simple. It was this. That the completion date can only be after submissions of the as–built drawings and the maintenance and operations manuals as well as after the re–measurement and certification and upon the issuance of the CPC. So, since no such certificate has been issued, the liquidated damages continues to run to date and as a result of which the respondent has a set–off or counterclaim which far exceeds the amount. Alternatively, if the completion date is deemed to have taken place at the time of the submission of the as–built drawings and the maintenance and operations manuals were submitted to MDC who had taken over the liability to pay the petitioner from the respondent, then the liquidated damages calculated up to the date of the documents were given to MDC would amount to RM15,128,000 which sum far exceeds the amount as stated to be owing in the petition. But the petitioner maintained that the amount owed as stated in the petition cannot be disputed because that very amount had been agreed to and confirmed. In rebuttal, the respondent stated that the confirmation and agreement came from MDC and even if the parties were to take the point of confirmation and agreement as the completion date, to wit, 10 April 2001 the liquidated damages calculated on a daily basis would come up to RM6,536,000. For these reasons, the stand of the respondent was this. That the respondent has a set off or counterclaim based on substantial grounds.

[30] There was therefore a bona fide dispute as to the debt. In such a situation, the respondent cannot be said to have neglected to pay on a statutory demand. There is also a related general principle of law. It is this. That a petition for winding up with a view to enforcing payment of a disputed debt is in fact an abuse of the process of the court and should be dismissed forthwith with costs (*Imperial Silver Quarries* (1868) 14 WR 1220; *Re Kings Cross Industrial Dwellings Co* (1870) LR 11 Eq 149; *Re London & Paris Banking Corp* (1875) LR 19 Eq 444, 446; *Cadiz Waterworks Co v Barnett* (1875) LR Eq 182; *Cercle Restaurant Castiglione Co v Lavery* (1881)

18 ChD 555; *Re The Imperial Hydropathic Hotel Co* (1882) 49 LT 147; *Re KL Tractors Ltd* [1954] VLR 505; *Bryanston Finance Ltd v de Vries (No 2)* [1976] Ch 63 (CA); and *Re Claybridge Shipping Co SA Com* LR 107 (1981) (CA)). Every case would depend on its own peculiar facts. The facts must also be borne in mind. I have done just that.

[31] The dispute must be bona fide in both its subjective and objective senses. So, the reason for not paying the debt must be honestly believed to be in existence and must be based on substantial (*Re Imperial Silver Quarries Co* ; *Re Kings Cross Industrial Dwellings Co*; *Re The Imperial Anglo–German Bank* (1872) 25 LT 895, 898; *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197, p 198 (CA); *Re KL Tractors Ltd*; *Mann v Goldstein* [1968] 1 WLR 1091, p 1096; and *Holt Southey Ltd v Catnic Components Ltd* [1978] 2 All ER 276, pp 277–278) or reasonable (*Re The Imperial Hydropathic Hotel Co*) grounds. According to the case of *Mann v Goldstein*, the word 'substantial' means having substance and it must not be frivolous. Nagging doubt and the question about the liability to pay the debt must be in existence and the court sees that there is indeed a question to be tried and decided (*Re The General Exchange Bank (Ltd)* (1866) 14 LT 582, p 583). According to Jessel MR in the case of *Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246, p 253, the onus falls on the respondent company 'to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in action, or by some other proceeding.' I apply generously the principle of law enunciated by Jessel MR in that case and I hold that the set off or counterclaim based on substantial grounds as alluded to earlier would clearly entitle me to strike out the petition with costs. I did just that.

Petition struck off.

Reported by Sally Kee Seok Meng